

**United States Department of Labor
Employees' Compensation Appeals Board**

S.C., Appellant

and

**FEDERAL JUDICIARY, U.S. PROBATION &
PRETRIAL SERVICES OFFICE, Roanoke, VA,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-1537
Issued: April 14, 2021**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 17, 2020 appellant filed a timely appeal from a February 28, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated November 28, 2018 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's December 2, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 28, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On May 30, 2018 appellant, then a 48-year-old senior probation officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained low back and bilateral hip pain when she slipped on a piece of wet plywood while in the performance of duty. In an October 31, 2018 statement, she explained that she had a history of back and hip pain that had been under control prior to the May 30, 2018 employment incident.

In support of her claim, appellant submitted reports dated March 20 through October 11, 2018 by Dr. Mark E. Kasmer, Board-certified in physiatry and sports medicine, describing a history of lumbar pain treated with facet injections in 2017 which was aggravated by a May 30, 2018 slip and fall. Dr. Kasmer diagnosed lumbar stenosis with neurogenic claudication and administered a second series of facet injections in 2018. Dr. Delmas Bolin, Board-certified in family practice and sports medicine, provided reports dated August 6 through September 21, 2018 diagnosing chronic lumbar, sacral, and bilateral hip conditions aggravated by a recent fall. He performed osteopathic manipulation. Appellant also submitted physical therapy treatment notes dated June 26 through August 9, 2018, and magnetic resonance imaging (MRI) scan studies of the lumbar spine, pelvis, and hips dated June 13, August 1 and 21, and September 12, 2018.

By decision dated November 28, 2018, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted May 30, 2018 employment incident.

OWCP subsequently received a report from Dr. Bolin dated November 9, 2018, a lumbar MRI scan report of even date, and reports from Dr. Bolin dated from March 15 through November 13, 2019. Appellant also provided copies of evidence previously of record.

On December 2, 2019 appellant requested reconsideration. She contended that the May 30, 2018 employment incident materially aggravated preexisting conditions, necessitating radiofrequency ablation performed on October 20, 2019. Appellant submitted a November 8, 2019 report by Dr. Bolin, noting that Dr. Kasmer had performed radiofrequency ablations on the right from L2 through L5 and on the left from L2 through L4. She continued to have significant pain after the procedure.

By decision dated February 28, 2020, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date (*i.e.*,

³ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s Integrated Federal Employees’ Compensation System (iFECS)).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP’s most recent merit decision was in error.⁷ OWCP’s procedures provide that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant’s request for reconsideration demonstrates “clear evidence of error” on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹¹

OWCP’s procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹² The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹³

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹¹ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹² *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

¹³ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

The last merit decision was issued on November 28, 2018. As her request for reconsideration was not received by OWCP until December 2, 2019, more than one-year time limitation, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.¹⁴

OWCP did not make any findings regarding the evidence submitted in support of the reconsideration request.¹⁵ It summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.¹⁶ Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁷ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁸ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁹

In denying appellant's December 2, 2019 reconsideration request, OWCP listed all the medical documentation it received since the November 28, 2018 decision, but failed to analyze whether it was sufficient to demonstrate clear evidence of error. The February 28, 2020 decision, simply noted: "The submitted information does not provide evidence that our office erred in issuing the contested decision." However, OWCP provided no discussion relative to the new medical evidence submitted by appellant.²⁰ The Board will therefore set aside OWCP's February 28, 2020 decision, and remand the case for an appropriate decision on appellant's untimely reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request.²¹

¹⁴ 20 C.F.R. § 10.607(b); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *See Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, J.K.*, Docket No. 20-0556 (issued August 13, 2020); *Order Remanding Case, C.D.*, Docket No. 20-0450 (issued August 13, 2020); *Order Remanding Case, T.B.*, Docket No. 20-0426 (issued July 27, 2020).

¹⁶ *See C.G.*, Docket No. 20-0051 (issued June 29, 2020); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

¹⁷ 5 U.S.C. § 8124(a).

¹⁸ 20 C.F.R. § 10.126.

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²⁰ *J.K.*, *supra* note 15.

²¹ 5 U.S.C. § 8124(a).

CONCLUSION

The Board finds that OWCP properly determined that appellant's December 2, 2019 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

IT IS HEREBY ORDERED THAT the February 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 14, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board